YALE LAW JOURNAL

SUBSCRIPTION PRICE, $2.50 A YEAR. SINGLE COPIES, 35 CENTS.

Published monthly during the Academic year, by students of the Yale Law School.
P. O. Address, Box 735, Yale Station, New Haven, Conn.

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise it is assumed that a continuation of the subscription is desired.

COMMENT.

POWER OF ATTACHMENT FOR CONSTRUCTIVE CONTEMPT.

A recent *nisi prius* case in Illinois has revived a discussion of the power of courts to levy attachment for constructive contempt.

The origin of this power is uncertain. It was exercised freely in the Star-Chamber upon the theory that the judge was the king's representative and any affront to him was an affront to the king's dignity. This Star-Chamber doctrine was boldly questioned in the reign of Charles I when he attempted to punish members of parliament for utterances made in debate therein. On this occasion the king weakened before judgment was given and had the cases transferred to the King's Bench, where judgment was given for him.

The judges were careful, however, to base their decision upon the double ground of affront to the king's dignity, and conspiracy to slander the State and raise sedition and discord between the king, his peers and the people. It was not thought safe to trust the judgment on the sole ground of contempt in speaking the words.

Before the abolition of the Star-Chamber, the courts of common law had settled down to the true principle, which sustains contempt as an offense; i. e., the disturbance of the courts, or the judges judicially sitting, or the hindering of the administration of justice, but still declared the offense to be against the crown and its dignity. *Harrison's Case,* Cro. Car. 503.

In this country the courts have assumed the prerogative of the English courts; both the power to punish for contempts, which under the English law were held to be acts which "disturb the courts or the judges judicially sitting," or "the hindering of the administration of justice;" and also for those acts which were affronts to the king's dignity, both, however, being assumed as incidental to the court's power to punish any act which brings the court into contempt, or hinders or intimidates it.

The feeling of dissatisfaction which not infrequently follows any signal recognition of the latter phase of this power, has in several cases resulted in its abolition by statute or constitution, and has engendered a public sentiment which may at no distant day result in its voluntary relinquishment by the courts.

The Supreme Court of Pennsylvania in 1802 committed one Passmore for a libel published against the defendant in a case then pending, in which case Passmore was plaintiff. *Respublica v. Passmore,* 3 Yeates 441. The judges were impeached, and although acquitted by a close vote, their action resulted seven years later in the abolition of the power of courts in that State to attach and punish summarily for constructive contempt. As a substitute, any person feeling himself aggrieved was given the right to proceed against the offender either by indictment or by an action for damages.

The Federal courts lost the power through the action of Judge James H. Peck of Missouri, who, in 1826 inflicted most severe punishment upon a lawyer for the slightest act of constructive contempt. Judge Peck was also impeached and acquitted, but Congress in 1831 passed an act providing that "the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to cases except the misbehavior of any person or persons in the presence of

the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistence of any officer of said courts, party, jury, witness, or any other person or persons to any lawful writ, process, order, rule, decree or command of the said courts." This law remains practically unchanged to-day. Sec. 725 R. S. For seventy years the Federal courts have been transacting business with a degree of facility fully equal to that displayed by any State court.

Constructive contempt has been abolished in New York by the Code. Civil Code, Sec. 8. It was abolished in Iowa by the Code as construed in *State v. Dunham,* 6 Iowa 245, and repudiated in Illinois in *Storey v. People,* 79 Ill. 45.

The right to attach for constructive contempt is not claimed to-day by an analogy. No judge attempts to base his judgment upon any ground other than that of obstruction or hindrance of the administration of justice, drawing no distinction between direct contempt committed in the presence of the court or resistance to its commands and constructive contempt committed outside of the courts and tending only indirectly to influence them. The rights of courts to maintain their dignity by punishing actual contempts is unquestionable, but may we not hope that with the growing tendency to disregard inapplicable English precedents, our courts will recognize a distinction between direct and constructive contempt and will voluntarily abrogate any supposed power they may have to punish an affront to royalty, in their capacity as representatives of the sovereign of England.